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3 UNITED STATES DISTRICT COURT
4 SOUTHERN DISTRICT OF NEW YORK

5 -----x
6 IN RE PETITION OF PANDORA MEDIA, INC. 12 Civ. 8035 (DLC) (MHD)

7 -----x
8 Related to

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 New York, N.Y.

12 v.

13 41 Civ. 1395 (DLC) (MHD)

14 AMERICAN SOCIETY OF COMPOSERS,
15 AUTHORS AND PUBLISHERS,

16 Defendant.

17 -----x
18 January 18, 2013
19 12:03 p.m.

20 Before:

21 HON. DENISE L. COTE,

22 District Judge

23 APPEARANCES

24 GREENBERG TRAURIG, LLP

25 Attorneys for Petitioner Pandora Media, Inc.

BY: KENNETH L. STEINTHAL

- and -

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1 (Case called; all sides ready)

2 THE COURT: This is our initial conference in this
3 case, and it is an opportunity for counsel to advise me about
4 what this case is about and for us to set the appropriate
5 schedule.

6 Mr. Steinthal.

7 MR. STEINTHAL: Thank you, your Honor.

8 We at Pandora filed this petition for a rate-making
9 proceeding, as your Honor knows. Pandora operated, as many
10 startups do as your Honor recalls from prior litigations, under
11 ASCAP's Experimental Internet License Form from its launch
12 until a period of time, December 31, 2010, when it terminated
13 that initial form license because it felt it was really
14 inappropriate for Pandora's emerging business, and it filed a
15 proceeding under the Consent Decree in order to get a license
16 thereunder and, if necessary, come to your Honor for rate
17 setting.18 It's been two years now that Pandora has been
19 operating under an Interim Fee Agreement without any kind of
20 final fee. During that period of time Pandora went public, and
21 as a public company, it is difficult for it to carry such a
22 long-term period without finality as to what its fees are.
23 That is one of the reasons that led us to file this petition.24 There are actually, as we lay out in the petition, two
25 general circumstances that led us to the point of actually

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1 filing, two logjams, so to speak. One was a logjam over fees,
2 and one was a logjam over a structural issue that I will
3 explain to you in a moment.

4 As to fees, during the course of the interim period,
5 your Honor is very familiar with the fact that the RMLC, which
6 was in litigation with ASCAP, entered into an agreement with
7 ASCAP. It's public what the fee structure is of that deal.
8 And importantly, your Honor, that deal covered not just
9 broadcast transmissions but Internet transmissions of RMLC
10 members, including totally Internet-only services, like
11 iHeartRadio, which is the largest competitor of Pandora.

12 Under the RMLC deal, which your Honor, I think,
13 approved at some point, the rates for Internet streaming are
14 1.7 percent of the Internet streaming services' revenue with a
15 25 percent standard deduction from revenue. So you have
16 effectively a net rate of 1.275 percent.

17 To put things in context, the Form ASCAP Internet
18 License --

19 THE COURT: Excuse me.

20 MR. STEINTHAL: OK.

21 THE COURT: What's the 25 percent? 25 percent of
22 what?

23 MR. STEINTHAL: It is a standard deduction.
24 Basically, it is like you may be familiar with the fact that
25 there is a advertising reduction of up to 15 percent under some

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1 ASCAP deals. Under the RMLC deal, there is a 25 percent
2 deduction from revenue for Internet services, as opposed to a
3 12 percent reduction in revenue for broadcast. And the reason
4 is, your Honor, it's much more expensive to sell ads on the
5 Internet, it's more of a struggle, and as a consequence, the
6 deduction associated with the cost of ad sales generally was
7 set at 25 percent under the RMLC deal. So it is basically
8 1.7 percent headline rate, 25 percent deduction, with a net
9 effective rate of 1.275 percent.

10 If you go to ASCAP's website and you look up the Form
11 Internet Services License, it is a 1.85 percent rate. So
12 basically it is almost 50 percent higher, because the deduction
13 under the Form Agreement is limited to outside agency
14 commissions. And Pandora does its own ad sales; it doesn't
15 really rely on agency commissions. So effectively there is a
16 50-percent markup between what Pandora would pay if it were
17 owned by an RMLC member as opposed what Pandora has to pay even
18 under the Form Agreement, which we don't think is reasonable
19 but it's there, the Form Agreement would be 50 percent higher.

20 So during --

21 THE COURT: So when you say "50 percent higher," you
22 are comparing the 1.275 percent net rate with the 1.85 percent
23 Form Agreement rate?

24 MR. STEINTHAL: Correct. Because the net and the
25 gross is the same for Pandora under the Form Agreement because

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1 the Form Agreement only allows for a deduction for outside
2 agency sales, and we sell our own advertising internally.

3 Under the RMLC agreement there is no distinction. You
4 get a 25 percent deduction, arguably, I think, in recognition
5 of the fact that it costs so much more. Internet ad sales is a
6 challenge. Companies hire their own people that are expert in
7 it because it is much more challenging than the traditional
8 broadcast ad sales market. Why else would there be a
9 25 percent standard deduction for Internet radio under the RMLC
10 deal while there is only a 12 percent deduction for broadcast
11 transmissions?

12 I mean, all of this would come out in discovery. We
13 are quite confident that it will come out exactly as I said.
14 But the bottom line is during the course of this almost
15 two-year period of negotiation, Pandora is operating and had
16 been operating under the Form rate, which, without getting into
17 the details of the Interim Fee Arrangement, became the basis of
18 the Interim Fee Agreement when we went forward, and all of a
19 sudden in the middle of the negotiation we see that RMLC owned
20 Internet radio services, including our largest competitors --
21 and it doesn't matter who owns you, there are a lot Internet
22 radio services out there and they are in the same market we
23 are, but just by dint of the fact that some of them are
24 RMLC-owned, they get the benefit of this 1.7 minus 25 percent
25 rate.

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1 So we're in negotiations. That happens. And that
2 led, frankly, to a very difficult situation. ASCAP was seeking
3 to increase the rate over the prior experimental rate. We're
4 trying to get a rate that, as we put in our petition, we see no
5 reason as a matter of similarly-situated licensees why Pandora
6 should not get the benefit of that 1.7 minus 25 percent
7 standard deduction rate. At a logjam, at some point we threw
8 up our hands.

9 The other thing that led us to throw up our hands --
10 and this is, your Honor, a rather unique situation in history.
11 In April of 2011, EMI, then arguably the single largest
12 publisher within ASCAP, withdrew from ASCAP the right to
13 license, quote, new media transmissions of EMI catalog.

14 Then late this past year SonyATV, which had acquired
15 EMI in the interval, announced that it was withdrawing its
16 catalog. So we now have SonyATV owning EMI. Collectively,
17 depending on who you talk to, 25 to 35, somewhere more than
18 25 percent of the market has withdrawn from ASCAP the right to
19 license transmissions for new media and, in particular, that
20 affects Pandora. Interestingly, your Honor, it doesn't affect
21 the RMLC members. So, once again, we have a rather unique
22 circumstance where Pandora and other Internet-only enterprises
23 that are not owned by an RMLC member have to now do direct
24 deals with SonyATV and EMI.

25 The thing that, again, created the impetus for the

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3 filing before your Honor, apart from the rate issue --

4 THE COURT: Excuse me. EMI and Sony, they didn't join
5 like BMI or some other organization; they just want to handle
6 those negotiations directly?

7 MR. STEINTHAL: Let me clarify.

8 Every major music publisher has an ASCAP house and a
9 BMI house because the individual writers can only be a member
10 of either of ASCAP or BMI. So, you know, there is a separate
11 subsidiary of EMI Music Publishing that owns the catalog of
12 writers who are ASCAP members and a separate subsidiary that
13 owns the catalog who are BMI members and a separate subsidiary
14 that owns the catalog of the SESAC writers.15 Let's put BMI aside; they are not your Honor's
16 problem.17 So when EMI announced its pullout, EMI controlled we
18 thought it was roughly 20 percent of ASCAP's share of Pandora
19 uses, the single largest music publisher that we were aware of.
20 That was April 2011. At some point thereafter, it was actually
21 during the time when Pandora was negotiating with EMI a direct
22 license with EMI, because it had to, SonyATV began efforts to
23 acquire EMI. That was obviously subject to antitrust scrutiny.
24 Pandora did a deal with EMI while the regulators were looking
25 at the merger. Fast-forward to post-merger, 2012, SonyATV
announces that it's going to withdraw its catalog from ASCAP
effective 1/1/13.

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1 The struggle we were having, just directed at ASCAP,
2 was that clearly if 20 percent, then 30 percent in toto of the
3 uses Pandora is making are catalog that has been withdrawn from
4 ASCAP, we're not going to pay the same percentage of revenue
5 rate. Let's assume we all had an agreement that X percent was
6 the right number. Clearly, if 30 percent of the repertory has
7 been withdrawn and Pandora has to do a direct deal with EMI and
8 SonyATV, we need a carveout.

9 This is even a little bit different than the DMX case,
10 which your Honor is familiar with, where the licensee was the
11 one who initiated the direct licenses, and some degree of
12 administrative fee your Honor had to struggle with. Here, we
13 didn't do anything. This is just publishers withdrawing. And
14 we clearly are entitled to a carveout. We had no -- in the
15 negotiations that led to the filing, we were nowhere near a
16 meaningful agreement on how to deal with that carveout.

17 So you have two things that led to the filing: Huge
18 rate disparity, RMLC deal -- 1.7 minus 25 -- ASCAP seeking more
19 than the Experimental Form Agreement, and for Pandora, which
20 has in the last couple of years had huge increases in
21 listenership, we're talking millions of dollars a year in the
22 delta between what the RMLC Internet streaming rate would be
23 and the Experimental Form Agreement that ASCAP has on its
24 website, and now ASCAP wants more than that. So we're really
25 dealing with a very huge disparity. That's what led Pandora to

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1 make the filing.

2 THE COURT: It may not be relevant to this conference
3 and to, you know, me learning about the case and us setting a
4 schedule together, but I'm going to want counsel at some point
5 to help me perhaps remember, or perhaps learn, the chain of
6 rights from the artist for this new media and how those license
7 fees get paid when the publisher, as in this case, has made a
8 choice for an ASCAP artist, for the publisher to leave ASCAP
9 with respect to new media rights.

10 MR. STEINTHAL: I think that's going to -- it will be
11 interesting because we want to learn, too. This is brand new,
12 your Honor. Their special new rules were published in a
13 compendium on ASCAP's website that discovery will reflect
14 exactly how it happened, because this has never happened
15 before. Direct licenses have always happened, in time, where
16 an individual work is licensed by an ASCAP member without --
17 there is no withdrawal. There is no catalog withdrawal. It is
18 just I'm an ASCAP member. DMX comes to me. Offers me a
19 certain amount of money to do a direct deal. You don't have to
20 withdraw from ASCAP. That is just a direct license. ASCAP
21 doesn't pay the publisher who does a direct license. That's
22 been happening for decades.

23 This is totally new and it is kind of baffling. There
24 is no -- your Honor, well, I'll bring you back to MobiTV.
25 There is no difference in the performing right between whether

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3 the performance occurs in radio or television or new media.

4 It's just the public performance right in the composition.

5 This notion that major publishers are withdrawing performing

6 rights from one kind of media while leaving the exact same

7 compositions in ASCAP for licensing, by ASCAP, even in the same

8 medium -- think about how crazy it is. RMLC owns an Internet

9 radio service. Let's call it iHeart. It just happens to be

10 the name of one. There is no -- the publisher withdrawal

11 doesn't apply to them; they're paying for all of the catalog

12 they use on a standalone Internet radio service to ASCAP at 1.7

13 minus 25 percent.

14 Pandora has got a double whammy here. ASCAP is

15 seeking, because they are new media owned by Pandora instead of

16 new media owned by an RMLC member, they want a higher rate and

17 we've got to go outside of ASCAP to get direct licenses for

18 30 percent of the catalog that used to be licensed by ASCAP.

19 Obviously, among other things, we need to deal with an

20 appropriate carveout.

21 Our belief is -- you know, we know exactly what we

22 pled from a sound-recording perspective. We can give ASCAP,

23 BMI and SonyATV a census report, this is what we played. But

24 one of the most bizarre things, your Honor, is they can't even

25 tell us exactly how many of those works have been withdrawn.

26 We've asked ASCAP. We've asked Sony. We've asked

27 BMI. They don't even know yet exactly what's withdrawn and

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3 what isn't withdrawn. And the irony of ironies is that
4 currently, as we will pay in the fourth quarter of 2012 in Q1,
5 when we pay our interim fees, we are still paying it all to
6 ASCAP because they can't figure out how to process their own
7 information. And we're paying -- get this -- at three
8 different rates to the same entity: The ASCAP interim fee rate
9 for stuff that hasn't been withdrawn; the direct deal with EMI,
10 which we did in 2012 for the EMI withdrawn catalog; and then
11 the new rate that Pandora, under absolute gun-to-the-head
12 circumstances at the end of last year, because it didn't do a
13 deal with SonyATV by January 1st since they had pulled out the
14 repertoire, they are at risk of infringement.

15 And isn't it funny, as you'll see later, there are two
16 articles, your Honor, that came out in the last two days. This
17 hush, hush deal that we did with SonyATV, somebody out there
18 started talking to the press. Article in the New York Post
19 yesterday, article in the Digital News today talks about how
20 SonyATV -- this is reported, I'm just reporting to you what's
21 reported. I'm not reporting to you the deal. They are all
22 reporting that SonyATV was able to get a 25 percent increase
23 because it pulled out of ASCAP, because it thought that it
24 could evade the oversight of a rate court. This is what they
25 are talking about in the press.

26 So here we are. And, interestingly enough, your
27 Honor, when the EMI/SonyATV deal was subject to antitrust

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3 regulation scrutiny, you will see later the difference between
4 the rate EMI agreed to before their merger was approved and the
5 rate they squeezed Pandora to pay at the very end of
6 December 2012. It smells. It just smells.

7 But we're here principally to get rate court rate set.

8 Your Honor, the delta between what we think we're
9 entitled to, even on an interim fee basis, and what ASCAP has
10 sought is millions per year. We know your Honor's predilection
11 is not to have interim fee litigation. We are prepared to
12 forgo interim fee litigation if we can get two things: One is
13 an appropriate carveout for the now roughly 30 percent of
14 catalog that SonyATV and EMI account for; and if we can get to
trial fast. We would like to get to trial by the end of this
year.

15 THE COURT: That I can do for you.

16 MR. STEINTHAL: So that's what this case is all about.

17 THE COURT: OK. Mr. Cohen.

18 MR. COHEN: Your Honor, I disagree with almost
19 everything, but let me deal first with your question.20 Here's what happened. Sony and EMI have withdrawn
21 rights. They have the right to do it. ASCAP is a voluntary
22 association. Members do not have to license through ASCAP.
23 And, frankly, what the record is going to show is that some of
24 the publishers have been unhappy with ASCAP's licensing rates
25 in this new media space.

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1 Now, the irony, to pick up on one of Mr. Steinthal's
2 words, is for 60 years the applicants have been saying ASCAP is
3 a monopolist and they don't engage in market deals. And now
4 some members, who are not subject to the Consent Decree when
5 they license alone, have pulled out and done a market deal,
6 kind of like what Sony did in DMX, and they say, oh, it's very,
7 very high, it's smelly. It's the market. It's the market.
8 And the fact of the matter is no one has to license through
9 ASCAP.

10 Now, with respect to the artist, typically the artist
11 assigns copyright to the publisher. The publisher typically
12 owns the copyright. So the publisher is free to exploit the
13 works, and it has to account to the writer whether it licenses
14 through ASCAP or whether it licenses on its own. And typically
15 in performing rights, as opposed to mechanical rights, it is
16 typically a 50/50 split. So the expectation is that whether --
17 the expectation is whether Sony licenses through ASCAP or Sony
18 licenses directly, that it will split those performance fees
19 that it gets on the deal 50/50 with the writer.

20 So if Sony meets its obligations, one of the reasons
21 that the writers like ASCAP is that ASCAP accounts to writers
22 directly. Instead of the money going back to the publisher,
23 there is a direct check cut to the writer. But assuming that
24 Sony accounts properly, it won't make a difference with respect
25 to that split although the rate may be different.

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3 THE COURT: Excuse me one second.

4 MR. COHEN: Yes.

5 THE COURT: I want to make some notes based on what
6 you have said.

7 MR. COHEN: Of course.

8 (Pause)

9 THE COURT: So you think that companies like Pandora
10 should be willing to pay higher rates to ASCAP in order to
11 prevent or to reduce the incentive for more publishers to
12 withdraw from ASCAP and charge even higher market rates?

13 MR. COHEN: No, your Honor, I am not saying that.

14 THE COURT: OK.

15 MR. COHEN: I'm really not saying that.

16 THE COURT: OK.

17 MR. COHEN: What I'm saying is that -- let me deal
18 with this carveout question first and then come back to rates
19 because I think that is more complicated.

20 THE COURT: OK.

21 MR. COHEN: I didn't think we were negotiating interim
22 fees in this courtroom, we were having discussions. But the
23 fact of the matter is, both on interim and on final, ASCAP
24 recognizes that there needs to be under the Mobi decision an
25 adjusted fee blanket license that deals with the fact that some
of the repertory has been directly licensed, and we will do
that. I think we may have a disagreement with Mr. Steinthal

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3 ultimately about how it is computed. I don't think if you
4 write a check for \$100 you get a \$100 reduction from your ASCAP
5 fee.6 I think the question ultimately that has to be
7 answered is what is the reduction in the value of the ASCAP
8 license as a result of not licensing the entire repertory.
9 And, in fact, we will work that out and I'm sure we will work
10 something out in the interim, but I don't think Sony's share is
11 anything like 30 percent of ASCAP but the numbers will be what
12 the numbers are.13 And one of the reasons -- let me try to be clear, your
14 Honor, it is not in incompetence on the part of ASCAP as to why
15 this is complicated. It is complicated because ASCAP
16 administers for Sony for domestic writers, for foreign writers,
17 and while Sony can withdraw with respect to domestic writers,
18 it actually cannot withdraw for foreign writers. The PRS,
19 which is the British society, for example, has informed ASCAP
20 that under its rules, publishers may not license directly.21 So parsing through the hundreds and hundreds of
22 thousands, if not millions, of compositions that are in the
23 Sony EMI repertory -- I don't know the number offhand but it is
24 a very large number -- and figuring out which are domestic and
25 which can be withdrawn and which are foreign and which can't be
withdrawn and how do you deal with the huge number of works
that copyrights are jointly owned, sometimes by Sony writers

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1 and sometimes not by Sony writers, this is all new territory.

2 We are trying to work that out with our members.

3 So, you know, ultimately this will all get worked out.
4 But both for interim -- and I've told that to Mr. Steinthal and
5 we will have some discussions hopefully within the next week --
6 and for final, ASCAP expects to present a blanket fee that will
7 take into account the fact that it doesn't license the entire
8 repertory.

9 So I don't think we have a huge dispute. I think the
10 dispute will be how it gets done. We'll either work it out or
11 we'll litigate it. But ASCAP is not resisting in this court,
12 nor could we, since your Honor ruled and the Second Circuit has
13 ruled that we are obligated under the current Consent Decree to
14 give an adjusted fee blanket license, and we will do that.

15 So let me go to the fee point. My point, your Honor,
16 is not that ASCAP is trying to hold anybody up. It is that
17 your Honor has found that, for example, in DMX, that a direct
18 license rate is a comparable that should be taken into account
19 in setting the market rates. And where I really disagree with
20 Mr. Steinthal is not only do I not think the radio rate is the
21 right comparable -- I'm going to come to that in a moment --
22 but there are a range of comparables that need to be taken into
23 account.

24 You know, the range of comparables that need to be
25 taken into account certainly include this new Sony deal. He

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1 says they had a gun to their head. I mean, they engaged in a
2 free-market transaction just like they do with the record
3 companies. They don't have to, just like they do on the record
4 side. And so they had a free-market transaction with Sony.
5 There was a prior transaction with EMI. Your Honor set a rate
6 for audio only in Mobi which is considerably higher than the
7 rate that they are suggesting. There is a music choice rate.
8 So there are -- and there is radio, which I'm going to deal
9 with in a moment. So there are a range of comparables, and
10 what ASCAP is saying is that we should be paid commensurate
11 with the appropriate comparables.

12 The reason why we don't think the radio rate is the
13 right rate is several. One -- and I don't know if your Honor
14 recalls my long discussions with Mr. Rich here, but, you know,
15 what the radio industry said to your Honor in open court and
16 what the record will show happened in the course of the
17 negotiation was -- and I this I Mr. Rich's words were tailing
18 and dog.

19 The huge dog in the radio industry that led to this
20 deal was terrestrial radio. 95 percent of the economics -- it
21 could be 98 percent but it is certainly no less than 95 percent
22 of the economics of the radio deal are on the terrestrial side.
23 And there was a complicated retroactive adjustment of the
24 interim fee in radio, because radio had gone off the percentage
25 of revenue, if you recall this. Radio said we had gone up from

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3 1.6 to 2.8 percent as a result of going from percentage of
4 revenue to flat dollars, and we don't think that that was what
5 the parties intended. So there was a very complicated deal
6 driven by dollars.7 As part of that deal, the radio stations that agreed
8 to pay the new terrestrial rate were in fact given this online
9 rate, whether they are using it for music intensive or for more
10 mixed format. But there is no standalone radio rate at
11 1.7 percent absent this deal. It was done in the context of
12 this deal, and the parties essentially agreed not to litigate
13 over the online rate to get this deal done, which for this
14 five-year period will be 95 percent terrestrial. So that is
15 one huge distinction.16 There are other distinctions. Pandora works
17 differently. It is not just radio, it is not interactive under
18 the copyright law, but you get to kind of essentially create
19 your own playlist, your own radio stations, based on your
20 affinity, and it is wall-to-wall music. There is more music
21 per hour in Pandora than there is on radio. There is a degree
22 of I'll call it quasi-interactivity. And all of those need to
23 be adjusted.24 So with respect toward the Form License of ASCAP,
25 that's for startups, essentially, and it is a way to get this
thing going. Pandora's revenues -- again, publicly
disclosed -- you know, it is in the many hundreds of millions

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3 of dollars. We are not dealing, like we were in Mobi, with
4 some kind of struggling startup; we are dealing with a large
5 entity that's making very, very large payments to the record
6 companies for the sound recordings, about which they are
7 complaining loudly, and wants to make very, very tiny payments
8 to music publishers for the songs.9 So what we have are a series of comparables, and
10 apparently we have disagreement as to where in this range of
11 comparables Pandora should lie. We would say that's not a
12 radio rate that was negotiated outside the context of this
13 bundled deal, and in any case, we've got to deal with all of
14 these other deals. And the fact of the matter is the Sony deal
15 was a market comparable in DMX and I don't understand why it
16 shouldn't be a market comparable here.17 I don't know anything about their deal. We will get
18 it in discovery. I have no idea if The Post is right or wrong.
19 The one thing I know is I didn't leak it because I don't know
20 what the deal is. So we will get the Sony deal. Mr. Steinkthal
21 has provided the EMI deal to us already in the course of what
22 turned out to be unsuccessful settlement discussions, and we
23 will have a discussion about where Pandora should be.24 But I don't understand the argument that a deal that
25 was done at arm's length between a music publisher that's not
subject to a consent decree when it is licensing directly --
but that is all this is is a direct license, just like in

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4 DMX -- and a user is in a market comparable. Now, I'm not
5 saying your Honor has to accept one or the other -- I mean,
6 there is time for that -- but there is a broad range here. So
7 I think that is why we're here.8
9 In terms of interim fee litigation, I don't think
10 we're going to need it.11
12 And in terms of expedition, my only difference with
13 Mr. Steinthal is just kind of looking forward over a couple of
14 months. You know, I have never appeared before your Honor
15 without an agreed-upon schedule. I'm somewhat embarrassed we
16 couldn't agree upon one here. It seems to me we should be able
17 to do that.18
19 We had proposed a schedule to Mr. Steinthal that would
20 have basically had this ready in April, and I will explain why,
21 of '14. He said that was too late. So we came back with a
22 different schedule for February. That has been rejected. So
23 we have a two-month disagreement over the schedule.24
25 My own experience -- I know your Honor's experience --
is these things tend to take longer than one would hope. I
know your Honor does not like to adjust the trial date once
you've set it. So all that we're looking for, and given that
the holidays are approaching, is I'm really looking for a trial
date kind of in the first part of February of '14 rather than
in December of '13.

THE COURT: Excuse me one second.

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1 (Pause)

2 MR. COHEN: And, your Honor, the argument that they
3 are a public company and they need certainty, virtually all the
4 large licensees of ASCAP are public companies. Sometimes they
5 are open for a long time, sometimes they are not. Accountants
6 know how to deal with this. They reserve. They take
7 appropriate provisions. But, you know, Viacom, NBC, CBS, every
8 cable company, all the major radio companies with whom we were
9 on interim before we settled, almost all of the large licensees
10 of ASCAP are public companies. So there is nothing unique
11 about Pandora's position.

12 I am just trying to be practical about the schedule.
13 I don't think the world turns on a few months. And I don't
14 think we would benefit from having adequate time. There are
15 some new issues to be explored here. I do think for the first
16 time your Honor will hear economic testimony on the value of
17 the carveout which I think, you know, will be significant. And
18 I think there will be reasonably extensive discovery not just
19 of ASCAP and Pandora but of Sony and BMI. I don't know where
20 they are with BMI. BMI was mentioned in their papers but only
21 with respect to the radio license.

22 So as a practical matter, I was looking for six months
23 of fact discovery, a couple of months of, you know, expert
24 reports and discovery and this is so expert-driven. Of course,
25 your Honor wants written directs. So I do have a proposed

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3 schedule at least, which I've shared with Mr. Steinthal, but
4 I've actually peeled this back a couple of more weeks and I
5 hope that you would agree to it. And if I could hand that up
6 and you can look at that and mark it up as you see
7 appropriately and at least that will give us a chance, a place
8 to start.

9 THE COURT: Sure.

10 MR. COHEN: I think, Ken, this is the one I gave you.

11 (Handing)

12 MR. STEINTHAL: OK.

13 MR. COHEN: Your Honor, it does provide for seeing
14 Magistrate Judge Dolinger, which we would welcome here, at a
15 reasonably early date.16 THE COURT: I think this is a very thoughtful
17 proposal, written in a way that would permit the trial of this
18 case to be held in April of next year.

19 Just give me a second, counsel. Thank you.

20 (Pause)

21 MR. STEINTHAL: Your Honor, if I could be heard on the
22 schedule issue one more time? I would appreciate it.23 THE COURT: Yes. Absolutely. I am not going to make
24 a decision without fully consulting with both counsel.

25 MR. STEINTHAL: OK.

26 THE COURT: I am just trying to get a handle on my own
27 calendar so I know what my flexibility is, depending on what

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1 year we are talking about.

2 (Pause)

3 THE COURT: OK. I think it is a little premature to
4 talk -- I'll hear from you Mr. Steinthal, but then I may have a
5 series of questions about what we want to accomplish before the
6 trial so I have a better understanding of the burden of the
7 fact discovery period from counsel. OK?

8 MR. STEINTHAL: OK. The thing I wanted to say about
9 the schedule is, I mean, whatever time we have we always manage
10 to fill up and we always manage to try to get things done by
11 whatever the schedule is. I mean, that is just the Murphy's
12 Law of court scheduling. We deal with what we have to.

13 I think if, your Honor -- and I would be happy to send
14 you these two articles that were published, but one of the
15 really interesting things is they both talk about how Pandora
16 is going to get hit in, you know, financial reports and stuff
17 like that. This is a quarter-by-quarter business where
18 financial analysts are looking at Pandora very closely. And
19 just the SonyATV deal announcement, as recorded in the press,
20 is negative financial news to Pandora and it hurts Pandora.

21 That's why -- it may be that mega companies don't
22 care, but Pandora's financial scrutiny is palpable quarter by
23 quarter. We have been operating interim for two years. It
24 really matters to Pandora. Another quarter matters in terms of
25 getting finality.

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1 And I can't -- that is what is driving Pandora to ask
2 me to ask you to get to a final result as soon as possible.
3 Obviously, we will abide by whatever your Honor rules as an
4 appropriate schedule, but that's the issue here from Pandora's
5 perspective.

6 THE COURT: Now, you heard Mr. Cohen talk about the
7 fact that ASCAP admits there must be a carveout and the issue
8 is how much of a carveout and how it would be structured.

9 So let me assume that you are going to be able to
10 handle the interim fee aspect of this in further discussions
11 with each other.

12 MR. STEINTHAL: OK.

13 THE COURT: Are you taking the position that there
14 aren't a range of comparables here and that we don't need to
15 look at each of them, including the EMI and the Sony deal?

16 MR. STEINTHAL: Your Honor, I think, as a matter of
17 jurisprudence there, it is incumbent upon you to look at
18 whatever the parties propose as comparables. We believe that
19 the RMLC deal -- and Jay was focused on the terrestrial
20 broadcasters. I'm focused on the Internet radio services that
21 are subject to the rate structure that I mentioned. Standalone
22 Internet radio services with the exact same kinds of
23 functionality and, you know, exact same magnitude of music
24 usage paying 1.7 minus 25 percent. So we do believe that is a
25 comparable. And the tail wagging the dog, well, we'll see in

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1 discovery exactly what it shows, but that to us is a
2 comparable.

3 I mean, Mr. Cohen also --

4 THE COURT: I understand that you believe that is the
5 best comparable.

6 MR. STEINTHAL: Right. But I've got to explain to
7 you -- and I Ann think discovery will show -- that the last
8 deal, the Sony deal at the last minute, I believe we will show
9 you in discovery why that is not a free-market deal that you
10 should deal to be a good comparable.

11 THE COURT: OK. But my questions are not really on
12 the merits but in terms of the scope of discovery.

13 MR. STEINTHAL: Right.

14 THE COURT: It sounds to me like everybody agrees that
15 each of you has to have a discovery period that permits you to
16 present to me a range of comparables and to be able to argue
17 from them which are the most persuasive.

18 MR. STEINTHAL: I think that's right, and I think
19 that's a discovery period of a few months and we can get it
20 done.

21 THE COURT: OK. So what else is there that would
22 consume the fact discovery period? I assume that there is no
23 dispute that the figures that Pandora could provide
24 electronically, and on a summary basis, with respect to their
25 revenue streams would be quickly produced and readily

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MR. STEINTHAL: This is a case, your Honor, where revenues and music use will be discrete. There will be no allocation issues. There will be no unbundling issues. It is going to be census reporting on music use. It's pretty simple. It is straightforward.

THE COURT: Mr. Cohen.

MR. COHEN: Well, maybe from his perspective, your Honor.

Again, this is not the most complicated case in the history of the world. Right? I think we are talking about a difference of perspective of a few months, so I don't want to totally disagree with what Mr. Steinthal is saying. But the music use is so vast, to actually process it and get it ready for the experts and present it in a way that we can compare music use on Pandora to other licensees like radio will be a big job. It will be a very, very big job.

The other part of it is, of course, that Mr. Steinthal will undoubtedly seek from us discovery with respect to all of our other new media licenses, which we haven't talked about. He has talked about this Form license. I don't think the Form license is an appropriate comparable.

So, again, you know, I think we are talking about are we going to finish the discovery in May or in June or July or August. We are not talking about a huge gap between the

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1 parties, but I do think it's complicated. And we'll get
2 started right away. You know, I'm happy to undertake Mr.
3 Steinthal's document requests within the next week. I will be
4 stunned if I see any documents in 30 days. That just hasn't
5 been the practice for all of the documents that we are asking
6 for.

7 So all we are trying to do is to allow a schedule that
8 has a locked-in trial date so that we don't have to come back
9 to your Honor. I think Mr. Steinthal and I both agree that we
10 can work out interim dates.

11 MR. STEINTHAL: Yes, I think that is right, your
12 Honor. It is just when we get to trial.

13 THE COURT: OK. I am happy to choose an arbitrary
14 trial date. It is not my practice to do that. I try to and I
15 may not be very good at this, but understand what the parties
16 need to do an expedited but not ferociously aggressive period
17 for discovery.

18 Let's talk about depositions. Assuming that for these
19 various third parties you might need one 30(b)(6) per party --
20 there aren't a host of them you would be doing; a handful, I
21 guess, if you need any third-party discovery -- so principally
22 for depositions I think -- you know, tell me if I am perceiving
23 this wrong -- that more of the depositions will be party
24 depositions here. And have you talked about the number of
25 depositions per side?

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1 MR. COHEN: We haven't, your Honor, although I think
2 the third-party discovery is more than a handful. If I may? I
3 think there will be discovery from BMI. I think there will be
4 discovery of folks on the RMLC who engaged in the deal. There
5 is going to be discovery from EMI with respect to their deal.
6 They are no longer at Sony. Mr. Steinthal today said they
7 negotiated that deal in the context of antitrust. I don't know
8 what arguments were made about the context. There will be
9 discovery from Sony. There may be discovery from third-party
10 licensees.

11 There will be some effort on our part, your Honor, to
12 put this license fee request in the context of what their
13 overall rights burden is. And so, you know, I don't think
14 there is 50 third-party depositions, I think it may be
15 one-and-a-half to two handfuls. I assume that they want
16 ASCAP -- I assume that the ASCAP depositions will be four or
17 five in number. The same people tend to be deposed, the new
18 media licensing people who were responsible for distribution,
19 people who are licensed that are responsible for music use.

20 I think one twist here that Mr. Steinthal made
21 reference to -- and he can correct me if I am wrong -- is that
22 I am hearing -- and, you know, we have had some discussions --
23 I am hearing that he is going to undertake some amount of
24 discovery about the decision of these members to withdraw and
25 about the change in the compendium. Now we are talking about

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1 ASCAP board members.

2 There are 24 ASCAP board members. Obviously, I don't
3 think he needs all of them. I don't know how many he is going
4 to want. So I see maybe six or eight depositions for the ASCAP
5 side from their side. I don't know enough about their
6 structure, but I assume that once we have discovery both from a
7 person responsible for licensing, you know, somebody with a
8 financial title, and then something that will allow us to
9 explore precisely what they do so we can draw the contrast and
10 parallels between radio on the one hand and Pandora on the
11 other, so, you know, I think certainly less -- you know, a
12 handful, you know, four or five. I think we are now up to
13 about 20 depositions.14 THE COURT: That's what I am piecing from this, that
15 altogether the parties here for this litigation may take about
16 20 depositions.

17 So just give me one second.

18 (Pause)

19 THE COURT: I'm thinking that this trial,
20 understanding that we will do direct by affidavit, might take a
21 week, might take two weeks, something like that.

22 Am I thinking in roughly the same terms as counsel?

23 MR. STEINTHAL: That sounds right to me, your Honor.

24 MR. COHEN: I believe it sounds right, your Honor.

25 (Pause)

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3 THE COURT: So let's go off the record.

4 (Discussion off the record)

5 THE COURT: Counsel and I have discussed the Court's
6 trial schedule, counsel's trial schedule, and some of our
7 expectations with respect to discovery in order to see if it is
8 at all feasible to accommodate Pandora's request for a 2013
9 trial.10 The trial in this case will occur on either
11 October 28th or November 4th. Counsel will provide me next
12 week with a proposed schedule based on a trial date of either
13 October 28th or November 4th at Mr. Cohen's discretion.14 Both sides are, I think, quite familiar with my
15 practices concerning discovery disputes. If there is any
16 dispute, get me a letter no longer than two pages. I will get
17 you on the phone and hear you out and give you a ruling
18 promptly.19 I don't know that there is anything else we need to
20 discuss.

21 Mr. Steinthal, anything from your point of view?

22 MR. STEINTHAL: Nothing else, your Honor.

23 THE COURT: Mr. Cohen?

24 MR. COHEN: No, your Honor.

25 THE COURT: Thank you.

Obviously, I think counsel are very experienced and
sophisticated with respect to these matters, but I just want to

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3 say that where sampling of financial data or any other data can
4 be used to get counsel the information they need and reduce the
5 burden on the producing party, I think you should explore that
with care, and if you can't reach agreement feel free to make
an application to me.

6 Thanks so much.

7 THE CLERK: All rise.

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